IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LAURIE POPKEN,	)	
	)	
Claimant/Appellant,	)	
	)	
v.	)	C.A. No. N11A-09-009 DCS
	)	
STATE OF DELAWARE,	)	
	)	
Employer/Appellee,	)	
	)	

Submitted: January 31, 2013
Decided: April 23, 2013

Upon Consideration of Appellant's Motion for Reargument and Clarification
Motion ***GRANTED***

ORDER

STREETT, J.

Appearances:

Jessica Lewis Welch, Esquire, Wilmington, Delaware
Attorney for Appellant Laurie Popken

Robert M. Greenberg, Esquire, Wilmington, Delaware
Attorney for Appellee State of Delaware

Before the Court is Claimant/Appellant Laurie Popken's ("Claimant") motion for reargument and clarification of the Court's July 30, 2012 opinion reversing and remanding the matter for the Industrial Accident Board ("the Board") to make a determination as to partial disability benefits. Reargument is sought on the issue of whether the Board is required to determine Claimant's eligibility for partial disability benefits from March 12, 2009 forward because Claimant, not Employer/Appellee State of Delaware ("Employer"), initiated the petition for a recurrence of total disability benefits.

Having considered the motion and the response, the motion for reargument is granted.

Factual and Procedural Background

In March 2005, Claimant suffered a compensable injury to her knees while working as a part-time cafeteria worker for the Brandywine School District.[1]

On November 7, 2008, Employer filed a Petition for Review of Claimant's eligibility for disability benefits in which it alleged that Claimant's recurrence of total disability had ended.[2] Claimant's had been released to light duty work sometime in 2009 and stipulated that she was no longer totally disabled as of March 12, 2009.[3] The stipulation indicated that Claimant did not oppose

[1] Tr. of Del. I.A.B. Hr'g, 8-9 (Aug. 18, 2011) (hereinafter "Tr.).
[2] *Popken v. State*, No. 1266150, at 2 (Del. I.A.B. Aug. 25, 2011) (hereinafter "Board Decision"). The Court notes that the Board Decision was not included in the Record of the Case.
[3] Tr. at 11, 19.

Employer's petition.[4] Based on the parties' stipulation, a Workers' Compensation Hearing Officer granted Employer's Petition for Review on April 24, 2009 thereby terminating Claimant's recurrent total disability benefits as of March 12, 2009.[5] At that time, Claimant conceded that she was capable of returning to the labor market.[6]

Approximately two years after her disability benefits were terminated, Claimant, on March 15, 2011, filed a petition seeking total disability benefits allegedly resulting from a left knee surgery that occurred on January 11, 2011.[7] Employer disputed that Claimant was entitled to recurrent total disability benefits on the basis that she had voluntarily removed herself from the workforce.[8] A hearing was held on August 18, 2011.[9] The Board found on August 25, 2011 that, despite being cleared to return to light duty work in 2009, Claimant did not actively seek employment after her benefits were terminated and prior to the January 2011 surgery.[10] The Board determined that Claimant's efforts to look for employment, which consisted of one or two visits to the Department of Labor and discussions with friends, did not constitute a reasonable job search.[11]

[4] *Popken v. State*, No. 1266150, ¶ 3 (Del. I.A.B. Apr. 24, 2009) (ORDER).
[5] *Id.* at ¶ 3, 4 (indicating that a hearing officer could, after considering the matter, issue an order approving the stipulation pursuant to 19 *Del. C.* §2301B(a)(4)).
[6] Tr. at 19.
[7] Board Decision at 2.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 6.
[11] *Id*. at 5-6.

Consequently, the Board found that Claimant had voluntarily removed herself from the workforce and, thus, was not entitled to recurrent total disability benefits.[12]

On January 20, 2012, Claimant timely appealed the Board's denial of total disability benefits, asserting that the Board erred as a matter of fact and law because there is no evidence that Claimant intended to voluntarily remove herself from the workforce and referencing partial disability.[13] Employer responded on February 10, 2012 that the Board's decision is free from legal error and is supported by substantial evidence.[14] Claimant submitted a reply brief on March 25, 2012.

On July 30, 2012, the Court reviewed the motions and remanded the matter for the Board to determine Claimant's eligibility for partial disability benefits from March 12, 2009 forward.[15] Claimant filed this motion for reargument and clarification with the Court on August 3, 2012. Employer responded on August 7, 2012. Upon the Court's request, both parties submitted supplemental briefs in 2013.

Parties' Contentions

In her motion for reargument and brief, Claimant asserts that the Board is not required to address partial disability because Claimant (not the employer)

[12] *Id*. at 6.
[13] Claimant/Appellant's Opening Br., 12, 17-18 (Jan. 20, 2012).
[14] Employer/Appellee's Answering Br., 15 (Feb. 10, 2012).
[15] *Popken v. State*, 2012 WL 4168330, *4 (Del. Super. Jul. 30, 2012).

commenced the petition for recurrent total disability benefits.[16] Claimant also concedes that she was not entitled to partial disability benefits between March 12, 2009 and January 11, 2011 because she did not have a loss of earning capacity attributed to her work injury.[17]

In its response, Employer concurs that Claimant's stipulation to her total disability benefits termination as of March 12, 2009 made her ineligible for partial disability benefits.[18] Employer also concurs that the Board is not required to make a partial disability determination because Claimant initiated the petition.[19]

Standard of Review

A motion for reargument is appropriate when asking the Court to "reconsider its findings of fact, conclusions of law, or judgment in order to correct errors prior to appeal."[20] The motion is not intended to be a rehashing of arguments already addressed by the Court.[21] Generally, reargument is denied "unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[22]

[16] Claimant/Appellant's Supplemental Br., 4 (Jan 10, 2013).
[17] Claimant/Appellant's Mot. for Reargument/Clarification, ¶ 3-4 (Aug. 3, 2012); Claimant/Appellant's Supplemental Br. at 2-3.
[18] Employer/Appellee's Resp., ¶ 9 (Aug. 7, 2012).
[19] Employer/Appellee's Supplemental Br., 1, 6 (Jan. 31, 2013).
[20] *Lowman v. Wal-Mart Stores, Inc.*, 2006 WL 2382776, *1 (Del. Super. Aug. 4, 2006).
[21] *Id.*
[22] *State v. Amin*, 2007 WL 3105895, *1 (Del. Super. Aug. 8, 2007).

Discussion

The party seeking to terminate, reinstate, or otherwise modify an award or agreement of benefits has the burden of proving a change in condition.[23] When an employer initiates a petition for review of total disability benefits, the employer must establish that the employee is "no longer totally incapacitated for the purpose of working."[24] The employer is required to demonstrate that the employee is ineligible for both total and partial disability benefits where there is an indication of "a continuing disability which could reasonably affect the [employee's] earning capacity."[25]

Upon reconsideration, in the instant case, the Board did not err when it made a determination, after a hearing, as to Claimant's ineligibility for total disability benefits without reaching a decision as to partial disability because Claimant initiated the petition and only sought total disability.

Here, Claimant had been terminated from her position with Employer in 2006 and released by her treating physician to work light duty in 2009. Claimant did not oppose Employer's petition for review of Claimant's eligibility for recurrent total disability benefits in 2009. In fact, she stipulated to the termination of her total disability benefits. And, although the exact date is unclear from the

[23] *DeAngelo v. Del Campo*, 1990 WL 74300, *1 (Del. Super. May 23, 1990).
[24] *Torres v. Allen Fam. Foods*, 672 A.2d 26, 30 (Del. 1995). *See also Bentzen v. Ciba Specialty Chems*., 2013 WL 1209344, *3 (Del. Super. Mar. 26, 2013).
[25] *Mladenovich v. Chrysler Group, L.L.C.*, 2011 WL 379196, *3 (Del. Super. Jan. 31, 2011) (internal quotation marks omitted); *Waddell v. Chrysler Corp*., 1983 WL 413321, *3 (Del. Super. June 7, 1983).

record, Employer presented Claimant with a labor market survey indicating available positions that Claimant would be capable of performing within her restrictions before its petition was granted by the Workers' Compensation Hearing Officer.[26] The labor market survey showed that Claimant's earning capacity had not been affected by her work injury. As a result, Employer satisfied its burden of proof as to Claimant's ineligibility for either total or partial disability benefits.

Subsequent to agreeing to the termination of her total disability benefits in 2009, Claimant now seeks total disability benefits. Claimant has asserted that she was incapable of work, then contested voluntarily removing herself from the workforce, and now challenges the remand because she contends that she is not a partial disability candidate.

At the Board hearing in 2011, Claimant asserted that she did not think that she was capable of returning to work prior to her January 2011 surgery and therefore was entitled to total disability. However, Claimant did not file a petition for additional benefits before the surgery and did not meet her burden of proving a change in her condition. The Board determined that she was ineligible for total disability.

On appeal, even though Claimant petitioned for total disability benefits, Claimant asserted that the Board failed to "articulate how work related partial

[26] Tr. at 36.

disability evidenced a voluntary removal from the workforce."[27] The Court remanded the matter on the issue of partial disability.

In her motion for reargument, Claimant admits that she was ineligible for partial disability benefits at the time she stipulated to the termination of her total disability benefits and for the period prior to her January 2011 surgery because she did not oppose the Employer's petition for termination of total disability. Furthermore, the parties agreed that Claimant was ineligible for partial disability because the labor market survey showed that she incurred no loss of earning capacity as a result of her work injury, and they agreed, citing *Mladenovich v. Chrysler Group, L.L.C.*[28], that the Board was not required to consider partial disability benefits at the time of Employer's petition because the parties consented to the termination of Claimant's benefits.

In view of Claimant's clarification that she now does not consider partial disability to be an issue and that partial disability need not be litigated, the Court returns to its analysis concerning Claimant's voluntary removal from the workforce.

[27] Claimant/Appellant's Opening Br. at 12.
[28] *Mladenovich v. Chrysler Group, L.L.C.*, 2011 WL 379196 at *3-4.

The Board's Decision That Claimant Voluntarily Removed Herself from the Workforce is Free from Legal Error and Supported by Substantial Evidence

The Court did not previously reach a decision regarding the Claimant's eligibility for recurrent total disability benefits when it remanded the matter. The Court will now review the Board decision concerning total disability.

A Board decision that is supported by substantial evidence and that is free from legal error will be upheld by the Court.[29] The role of the Court is not to weigh evidence or make credibility determinations and findings of fact.[30] Rather, it is to "determine only whether the evidence is legally adequate to support the Board's factual findings."[31] An alleged error of law is reviewed *de novo*.[32]

In the instant case, the Board discredited Claimant's contention that she did not think she was capable of working after her total disability benefits were terminated. The Board determined that Claimant had incurred no lost wages as a result of the January 2011 surgery because Claimant voluntarily removed herself from the workforce following her agreement to terminate her total disability benefits. The role of the Court is not to overturn the Board's credibility determinations where, as here, such determinations are supported by substantial evidence.[33]

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[29] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).
[30] *Chubb v. State*, 961 A.2d 530, 534 (Del. 2008).
[31] *Id.* at 534-35.
[32] *Vincent v. E. Shore Mkts.*, 970 A.2d 160, 163 (Del. 2009).
[33] *Flowers v. Daimler Chrysler Corp.*, 2005 WL 2303811, *5 (Del. Super. Sept. 20, 2005).

The law is clear that total disability benefits are intended to replace "wages lost when an employee is out of work recovering from an injury."[34] Where an employee voluntarily terminates her disability benefits, the employee has the burden of establishing her right to receive additional benefits by proving a recurrence of the work injury.[35] The Delaware Supreme Court has held that "[w]ork restrictions that continue to impair an individual in the same manner do not support a finding that the individual had a recurrence of total disability. If a condition has not changed for the worse, then no 'recurrence' has occurred."[36] To establish a claim for total disability benefits, the employee must prove that she was "actually incapacitated from earning wages."[37] Furthermore, under Delaware Workers' Compensation law, "voluntarily removing oneself from the workforce may disqualify [an employee] from disability benefits."[38]

Here, since Claimant agreed to terminate her total disability benefits in 2009 and then initiated proceedings for total disability two years later, she had to establish a right to receive additional benefits. Although Claimant testified that she did not intend to remove herself from the workforce prior to the January 2011

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[34] *Wilson v. Chrysler, L.L.C.*, 2011 WL 2083935, *3 (Del. Super. Apr. 26, 2011).
[35] *Cullen v. State*, 2007 WL 1241841, *1 (Del. Apr. 30, 2007) ("Following a voluntary termination of disability benefits, the burden is on the injured claimant to establish his right to additional benefits") (internal quotation marks omitted). *See also Walt v. Del. Home & Hosp. for Chronically Ill*, 2007 WL 1947370, *2 (Del. Jul. 5, 2007) (finding the claimant had the burden of proving her entitlement to additional benefits because she was the moving party); *Bradley v. Waco Scaffolding & Equip.*, 1997 WL 819131, *1-2 (Del. Super. Dec. 8, 1997) (affirming Board's denial of recurrent total disability benefits where claimant submitted no medical evidence showing that he suffered a recurrence of his work injury after he voluntarily terminated his benefits).
[36] *Chubb,* 961 A.2d at 535.
[37] *Jackson v. Genesis Health Ventures*, 2011 WL 141164, *2 (Del. Super. Jan. 6, 2011), *aff'd*, 23 A.3d 1287 (Del. 2011).
[38] *Hanover Foods v. Webster*, 2006 WL 2338046, *2 (Del. Super. Jun. 21, 2006).

surgery, Claimant presented no medical records or expert testimony to support her contention that she remained totally disabled during this time.[39] Despite the fact that she agreed to terminate her total disability benefits and that her treating physician placed her on light duty work status, Claimant maintained that she was totally disabled as a result of her work injury.

Claimant also testified that her only restrictions were related to her knees, she was uncertain whether her knee had been drained,[40] and she continued to see Dr. Leitman for almost a year and a half even though Dr. Leitman told her that she was "okay" after reviewing her x-rays.[41] Additionally, during this period, Claimant was treated for depression, anxiety, and a preexisting low back condition, all of which were unrelated to her work injury. Subsequently, in 2010, Claimant treated with Dr. Crain who referred her to Dr. Bodenstab who performed surgery on her left knee in 2011. In light of the above, the Board did not credit Claimant's testimony that she remained totally disabled prior to the surgery.

Instead, the Board found that, although Claimant was physically capable of returning to the workforce, she voluntarily chose not to pursue employment. The last time Claimant physically worked was in 2005 and her testimony about her

[39] *See Wilson*, 2011 WL 2083935 at *1,3 (affirming the Board's denial of total disability benefits where, after accepting a buyout, the employee failed to present any medical testimony or records to support his contention that his work injury prevented him from searching for alternative employment).
[40] Tr. at 13, 25. Claimant's initial testimony indicated that her left knee had been drained twice, although it is unclear from the record by whom. When the Board questioned Claimant about the treatment she sought for her knees between March 12, 2009 and January 11, 2011, Claimant was uncertain whether her knee had been drained during that period of time.
[41] Tr. at 26.

time spent at the Department of Labor was "vague."[42] Initially, Claimant testified that she went to the Department of Labor once. However, she later testified that it was twice and that she was unable to recall whether she followed up. Furthermore, over a period of nearly two years, the only other job search efforts Claimant testified about were her conversations with friends. Moreover, *Hanover Foods v. Webster*[43], where an employee's petition was granted, is distinguishable. In *Hanover Foods*, the Board found the employee's testimony to be credible because the employee attempted to find work, submitted applications, and attended interviews for three jobs in the months prior to being placed on a no-work restriction.[44]

In the instant case, the Board found that Claimant did not apply for any jobs in the period after she agreed to terminate her benefits in 2009. Due to Claimant's conflicting testimony about attempting to find suitable employment once or twice, the Board determined her testimony to be incredible and cited *Jackson v. Genesis Health Ventures*[45] in support of its decision to deny Claimant benefits. *Jackson* is factually similar in that the Board there discredited the employee's contention that she retired due to her work injury and found that the employee voluntarily removed herself from the workforce where the employee did not attempt to seek employment while she continued treatment.

[42] Board Decision at 5.
[43] *Hanover Foods v. Webster*, 2006 WL 2338046 (Del. Super. Jun. 21, 2006).
[44] *Id.* at *2.
[45] *Jackson v. Genesis Health Ventures*, 2011 WL 141164 at *3.

Here, although Claimant argues on appeal that she did not refuse employment, she also did not reasonably seek employment. Furthermore, Claimant failed to demonstrate that she was actually incapacitated from earning wages in the period prior to the January 2011 surgery. Because the Board found that Claimant chose not to pursue employment even though she was capable of performing some work, Claimant's voluntary removal from the workforce prior to the January 2011 surgery made her ineligible for total disability benefits.[46]

Therefore, the Board did not commit legal error by finding that Claimant voluntarily removed herself from the workforce following her agreement to terminate her total disability benefits. Substantial evidence supports the Board's decision denying Claimant's petition for a recurrence of total disability benefits.

ACCORDINGLY, Claimant's motion for reargument is ***GRANTED***. The Court ***AFFIRMS*** the Board's decision denying total disability benefits.

IT IS SO ORDERED.

/s/ Diane Clarke Streett
Streett, J.

[46] *See Cullen*, 2007 WL 1241841 at *2 (affirming the Board's denial of recurrent total disability benefits where evidence suggested that employee "was capable of working at least on a part-time basis").